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Tenth report on reservations to treaties

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I. Validity of reservations

1. The purpose of the second part of this report is to examine the conditions for validity of reservations to treaties and to propose a series of guidelines which will form the third part of the Guide to Practice, following the first part, devoted to definitions, and the second, which is concerned with the procedure for formulation of reservations and interpretive declarations. Next year this part will be supplemented by several draft guidelines regarding the validity of interpretive declarations — which actually pose few problems in this regard.

2. A first problem arises with the very title of this third part: after much hesitation, the Special Rapporteur has decided to revert to the phrase "validity of reservations" to describe the intellectual operation consisting in determining whether a unilateral statement made[1] by a State or an international organization and purporting to exclude or modify the legal effect of certain provisions of the treaty[2] in their application to that State or organization is capable of producing the effects attached in principle to the formulation of a reservation.

3. Faithful to the definition found in article 2, paragraph 1 (d) of the Vienna Conventions, reproduced in draft guideline 1.1 of the Guide to Practice, the Commission has accepted that all unilateral statements meeting this definition constitute reservations. But, as the Commission stated very clearly in its commentary on draft guideline 1.6, "[d]efining is not the same as regulating. [...] a reservation may or may not be permissible, but it remains a reservation if it corresponds to the definition established".[3] "Furthermore, the exact determination of the nature of a statement is a precondition for the application of a particular legal regime, in the first place, for the assessment of its permissibility. It is only once a particular instrument has been defined as a reservation (...) that a decision can be taken as to whether it is permissible or not, its legal scope can be evaluated and its effect can be determined.[4]

4. This language poses a problem. At the outset, the Special Rapporteur had indeed preferred the words "validity" and "invalidity" or "non-validity" to "permissibility" and "impermissibility".[5] This terminology was disputed by Professor D.W. Bowett, who believed that this concept gives rise to confusion between two different questions, the *permissibility* of a reservation and the *opposability* of a reservation (meaning whether it may be invoked against another party).[6] The Commission having used this expression in its report on the work of its

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[1] Given that the mere formulation of a reservation does not allow it to produce the effects intended by its author, the word "formulated" would have been more appropriate (see paras. 13 and 14 below); but the Vienna Conventions use the word "made" and as a matter of principle the Commission does not wish to revisit the Vienna text.

[2] Or of the treaty as a whole with respect to certain specific aspects (see draft guideline 1.1.1).

[3] *Yearbook ... 1999*, vol. II, (part two), para. 2 of the commentary.

[4] Ibid.; pp. 133-134, para. 3 of the commentary. See also the commentary on draft guideline 1.1.1 in *Yearbook ... 1998*, vol. II, part two, para. 3 of the third report, document A/CN.4/491/Add.3, paras. 158 and 179.

[5] In the preliminary outline he prepared on the subject in 1993, the future Special Rapporteur on the topic had used the expression "validity of reservations" (see *Yearbook ... 1993*, vol. II, (part one), p. 249).

[6] ILC/WG/LTPW/93/1/Add.1.

forty-fifth session,[7] the representative of the United Kingdom to the Sixth Committee stated, in 1993:

> "His delegation experienced some unease over the Commission's use of the term 'validity of reservations' in paragraph 428 of its report. While the context indicated what the Commission had in mind, the wording used could be interpreted as presupposing the possibility that a statement conditioning the consent of an adhering State to be bound by a treaty might by some means be held to be a nullity. In fact, article 2 (d) of the Vienna Convention, by referring to a reservation not only as a 'unilateral' statement which 'purported' to achieve an exclusion or modification of treaty terms, but even more so articles 19 et seq., in their careful references to 'formulation' of reservations, made it plain that any such statement was ipso facto a 'reservation', but that its legal effect remained to be determined by the rules which followed. That emerged with great clarity from the Commission's commentary on articles 17 to 19 of the 1962 draft and explained why, in the usage of the Vienna Convention, even the cases expressly prohibited, or those incompatible with the object and purpose of a treaty, were referred to in article 19 as 'reservations', and why article 21 referred to a reservation 'established with regard to another party'."[8]

5. As the Special Rapporteur indicated in his preliminary report, in his mind, "the word 'validity' was fairly neutral and did indeed encompass the question of the opposibility of the reservation which, in his view, is closely linked to the question of the legal regime of objections, even though it does not necessarily depend exclusively on that regime. Moreover, if the word 'permissibility' seems more appropriate, there is no problem in using it. It is in fact more accurate".[9] However, he noted[10] that the objections of both Professor Bowett and the British Government assumed the solution of the doctrinal controversy, central to the question of reservations, between the proponents of "opposability" and those of "permissibility"[11] in favour of this second thesis, of which Sir Derek Bowett is one of the most eminent representatives.[12] Subsequent to these observations, the Commission (and its Special Rapporteur) used the words "admissible" (*licite*) to describe a reservation likely to produce the effects envisaged by the Vienna Conventions, and "inadmissible" (*illicite*) to designate a reservation that could not produce them.

6. However, a new problem arose when:

> "some members pointed out that this word ['impermissible'] was not appropriate in that case: in international law, an internationally wrongful act entails its author's responsibility, and this is plainly not the case of the

[7] *Yearbook ... 1993*, vol. II (part two), para. 428; the Commission specified that the question of "the validity of reservations" "encompasses that of the conditions for the lawfulness of reservations and that of their applicability to another State".

[8] A/C.6/48/SR.24, para. 42.

[9] Preliminary report, A/CN.4/470, para. 99.

[10] Ibid., para. 100.

[11] Ibid., paras. 101 to 104.

[12] See Derek W. Bowett, "Reservations to Non-Restricted Multilateral Treaties", *British Yearbook of International Law 1976-1977*, p. 67 to 92.

formulation of reservations which are contrary to the provisions of the treaty to which they relate or incompatible with its object and purpose".[13]

Consequently, in 2002, the Commission decided to leave the matter open pending the examination of the effect of such reservations.[14]

7. On reflection, however, it is not appropriate for the Commission to wait until it has studied the effects of reservations before deciding on this question of terminology:

- In the first place, the term "permissible" used in the English text of the draft guidelines adopted to date and their commentaries implies that it is exclusively a question of permissibility and not of opposability;

- In the second place, the word "admissible", for its part, implies that the formulation of reservations while ignoring the provisions of article 19 of the Vienna Conventions engages the responsibility of the reserving State or international organization, which is certainly not the case.[15]

8. In any event, and this is the only point that matters at this stage, the word "validity" has the advantage of being neutral and of not prejudging either the response the Commission will make to the dispute between opposability and permissibility, or the question of the effects of formulating a reservation contrary to the provisions of article 19. Hence, on the one hand, there is no reason not to consider the question of the validity of reservations and, on the other, the Commission should, as a result, replace the words "admissible" (*licite*) and "inadmissible" (*illicite*) by the words "valid" and "invalid" in draft guidelines 1.6 (Scope of definitions) and 2.1.8 ("Procedure in case of manifestly [impermissible] reservations").[16]

9. With the benefit of this preliminary remark, this report will proceed to study in as much depth as possible the validity of reservations in the light of article 19 of the Conventions of 1969 and 1986, which undoubtedly constitutes the cornerstone of the Vienna regime,[17] following the general outline:

- Starting from the principle that there exists a presumption of validity of reservations (A),

- This provision spells out the cases in which a reservation is prohibited either expressly or implicity (B), before stating

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[13] Commentary on draft guideline 2.1.8 ("Procedure in case of manifestly [impermissible] reservations"), *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), para. 7, p. 114.

[14] Ibid.

[15] On this point, see A/CN.4/558/Add.2, paras. 190 and 191.

[16] Guideline 1.6 should read as follows: "The definitions of unilateral statements included in the present chapter of the Guide to Practice are without prejudice to the *validity* [not 'the permissibility'] and effects of such statements under the rules applicable to them"; and guideline 2.1.8 should be entitled "Procedure in case of manifestly *invalid* reservations" [not "*impermissible*"]. During the final "cleanup" of the Guide to Practice, the commentaries should also be modified in the same way.

[17] See Jean-Marie Ruda, "Reservations to Treaties", *Recueil des cours de l'Académie de droit international*, 1975-III, vol. 146, p. 180.

- The general requirement of the compatibility of reservations with the object and purpose of the treaty (C);

- Lastly, a general study will need to be made of the modalities for the application of these principles (D).

A. Presumption of validity of reservations

10. By providing that, when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, "[a] State or an international organization *may* (...) formulate a reservation", albeit under certain conditions, article 19 of the 1986 Vienna Convention sets out, as did the same provision of the 1969 Convention before it, "the general principle that the formulation of reservations is permitted ...".[18] This is an essential element of the "flexible system" stemming from the advisory opinion of the International Court of Justice of 1951,[19] and it is no exaggeration to say that, in this respect, it reverses the traditional presumption resulting from the system of unanimity,[20] the stated aim being to facilitate the widest possible participation in and, ultimately, the universality of treaties.

11. In this regard, the text of article 19, which resulted directly from Waldock's proposals, takes the opposite view from the drafts prepared by the Special Rapporteurs on the law of treaties which preceded it, all of which started from the opposite assumption, expressing in negative or restrictive terms the principle that a reservation may *only* be formulated (or "made"[21]) *if* certain conditions are met.[22]

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[18] Commentary to draft article 18 adopted on first reading in 1962, *Yearbook ... 1962*, vol. II, p. 180, para. 15; see also the commentary to draft article 16 adopted on second reading, *Yearbook ... 1966*, vol. II, p. 207, para. 17. For the 1986 Convention, see the commentaries to draft articles 19 (Case of treaties between international organizations) adopted in 1977, *Yearbook ... 1977*, vol. II, p. 106, para. 1, and 19 bis (Case of treaties between States and one or more international organizations or between international organizations and one or more States), *ibid.*, p. 108, para. 3.

[19] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 1951*, p. 15. See the preliminary report on reservations (A/CN.4/470), paras. 36-46.

[20] This concept, which had undoubtedly become the customary norm in the period between the wars (see the joint dissenting opinion of Judges Guerrero, McNair, Read and Hsu Mo appended to the aforementioned advisory opinion, *I.C.J. Reports 1951*, pp. 34-35), significantly restricted the freedom to make reservations: this was possible only if all the other parties to the treaty accepted the reservation, otherwise the author remained outside the treaty. In its comments on draft article 18, adopted by the Commission in 1962, Japan proposed reverting to the opposite presumption (see the fourth report on the law of treaties by Sir Humphrey Waldock, *Yearbook ... 1965*, vol. II, p. 496).

[21] On this issue, see below, paras. 13 and 14.

[22] See, for example, draft articles 10, para. 1, of the 1950 draft by J. L. Brierly (A/CN.4/23, English text in *Yearbook ... 1950*, vol. II, p. 238), nine of the drafts by Hersch Lauterpacht (first report (A/CN.4/63), reproduced in English in *Yearbook ... 1953*, p. 91; second report (A/CN.4/87), English text in *Yearbook ... 1954*, vol. II, p. 131) and 39, para. 1, of the draft by G. G. Fitzmaurice (*Yearbook ... 1956*, vol. II, p. 118). See the comments by Pierre-Henri Imbert, *Les réserves aux traités multilatéraux*, Pedone, Paris, 1979, p. 88 and 89.

Sir Humphrey, for his part,[23] presents the principle as the "power to formulate, that is, to *propose*, a reservation", which a State has "in virtue of its sovereignty".[24]

12. However, this power is not unlimited:

- In the first place, it is limited in time, since a reservation may only be formulated "when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty";[25]

- In the second place, the formulation of reservations may be incompatible with the object of some treaties, either because they are limited to a small group of States — a situation that is taken into account in article 20, paragraph 2, of the Convention, which reverts to the system of unanimity where such instruments are concerned[26] — or, in the case of global instruments, because the parties intend to make the integrity of the treaty take precedence over its universality or, at any rate, to limit the power of States to formulate reservations; on this issue, as on all others, the Vienna Convention is only intended to be residuary in nature and there is nothing to prevent the negotiators from inserting in the treaty "reservations clauses" that limit or modify the freedom set out as a principle in article 19.[27]

Thus, it is probably excessive to speak of a "right to reservations", even though the Convention undoubtedly proceeds from the principle that there is a presumption to that effect.

13. This is the meaning of the very title of article 19 ("*Formulation* of reservations"), which is confirmed by the *chapeau* of this provision: "A State may (...) *formulate* a reservation *unless* ...". Certainly, by using the verb "may", the introductory clause of article 19 recognizes that States have a right; but it is only the right to "formulate" reservations.[28]

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[23] "A State is free, when signing, ratifying, acceding to or accepting a treaty, to formulate a reservation (...) unless: ..." (*Yearbook ... 1962*, vol. II, article 17, para. 1 (a), p. 60).

[24] Commentary on article 17, ibid., p. 65, para. 9; the italics are in the text.

[25] See below, para. 19.

[26] "When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties."

[27] With regard to the residuary, voluntary nature of the Vienna regime, see the preliminary report on reservations (A/CN.4/470), para. 123; the second report on reservations (A/CN.4/477 and Add.1), paras. 26, 123, 133 and 163; the third report (A/CN.4/491 and Add.1-6), para. 139; or the fifth report (A/CN.4/508 and Add.1-4), para. 290; see also: Anthony Aust, *Modern Treaty Law and Practice*, Cambridge University Press, 2000, p. 124 to 126; John King Gamble, Jr., "Reservations to multilateral treaties: a macroscopic view of State practice", *American Journal of International Law*, 1980, p. 383 to 391; P.-H. Imbert, op. cit., note 22, p. 162 to 230; Lord McNair, *The Law of Treaties*, Clarendon Press, Oxford, 1961, p. 169 to 173; Jörg Polakiewicz, *Treaty-Making in the Council of Europe*, Council of Europe, Strasbourg, 1999, p. 85 to 90 and 101 to 104; Rosa Riquelme Cortado, *Las reservas a los tratados — Formulación y ambigüedades del regimen de Viena*, Universidad de Murcia, 2004, p. 89 to 136.

[28] P.-H. Imbert, op. cit., note 22, p. 83; see also Paul Reuter, *Introduction au droit des traités*, PUF, Paris, 3rd ed., revised and expanded by Philippe Cahier, 1995, p. 75; or R. Riquelme Cortado, op. cit., note 27, p. 84. It may also be noted that a proposal by Briggs to replace the word "free" in Waldock's draft (see above note 23) with the words "legally entitled" (*Yearbook ... 1962*, vol. I, 651st meeting, 25 May 1962, p. 140, para. 22) was not accepted, nor was an amendment along

14. The words "formulate" and "formulation" were carefully chosen. They signify that, while it is up to the State intending to attach a reservation to its expression of consent to be bound to indicate how it means to modify its participation in the treaty,[29] this formulation is not sufficient of itself: the reservation is not "made", it does not take effect, merely by virtue of such a statement. For this reason, an amendment by China seeking to replace the words "formulate a reservation" with the words "make reservations"[30] was rejected by the Drafting Committee of the Vienna Conference.[31] As Waldock noted, "there is an inherent ambiguity in saying (...) that a State may '*make*' a reservation; for the very question at issue is whether a reservation *formulated* by one State can be held to have been effectively 'made' unless and until it has been assented to by the other interested States".[32] Now, not only is a reservation only "established"[33] if certain procedural conditions — admittedly, not very restrictive ones[34] — are met, but it must also comply with the substantive conditions set forth in the three subparagraphs of article 19 itself, as the word "unless" clearly demonstrates.[35]

15. According to some authors, the terminology used in this provision is not consistent in this regard since if the treaty permits certain reservations (art. 19, para. (b)), they do not need to be accepted by the other States ... they are thus "made" from the moment of their formulation by the reserving State.[36] That being the case, while subparagraph (b) correctly states that such reservations "may be *made*", the

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the same lines proposed by the Union of Soviet Socialist Republics at the Vienna Conference (A/CONF.39/C.1/L.115, *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March-24 May 1968 and 9 April-22 May 1969, Documents of the Conference* (A/CONF.39/11/Add.2), p. 133, para. 175. The current wording ("A State (...) may formulate a reservation unless ...") was adopted by the Commission's Drafting Committee (*Yearbook ... 1962*, vol. I, 663rd meeting, 18 June 1962, p. 221, para. 3), then by the Commission in plenary (ibid., vol. II, pp. 175-176, art. 18, para. 1) in 1962. No amendments were made in 1966, other than the replacement of the words "*Tout État*" [in the French text] with the words "*Un État*" (see *Yearbook ... 1965*, vol. I, 813th meeting, 29 June 1965, p. 287, para. 1 (text adopted by the Drafting Committee), and *Yearbook ... 1966*, vol. II, p. 202 (article 16 adopted on second reading)).

[29] Cf. D. W. Greig, "Reservations: equity as a balancing factor?", *Australian Yearbook of International Law*, 1995, p. 22.

[30] A/CONF.39/C.1/L.161 (see *Documents of the Conference* (A/CONF.39/11/Add.2), cited above in note 28, p. 133 and 134, para. 177).

[31] See *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March-24 May 1968, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11), Committee of the Whole, 23rd meeting, 11 April 1968, p. 121, para. 2 (explanations by China), and 24th meeting, 16 April 1968, p. 126, para. 13 (statement by the Expert Consultant Sir Humphrey Waldock).

[32] First report (A/CN.4/144) cited above in note 23, p. 62, para. 1, of the commentary on draft articles 17 to 19.

[33] See the *chapeau* of article 21: "A reservation established with regard to another party in accordance with articles 19, 20 and 23 ...".

[34] See articles 20, paras. 3-5, 21, para. 1, and 23, and draft guidelines 2.1 to 2.2.3. See also Massimo Coccia, "Reservations to multilateral treaties on human rights", *California Western International Law Journal*, 1985, p. 28.

[35] "This article states the general principle that the formulation of reservations is permitted except in three cases" (*Yearbook ... 1966*, vol. II, p. 207, commentary to article 16, para. 17); the use of the word "*faire*" in the French text of the commentary is open to criticism, but it is probably a translation error, rather than a deliberate choice — *contra*: P.-H. Imbert, op. cit., note 22, p. 90. Moreover, the English text of the commentary is correct.

[36] P.-H. Imbert, op. cit., note 22, p. 84 and 85.

chapeau of article 19 is misleading for it implies that they, too, are merely "formulated" by their author.[37] Yet this is a quarrel over nothing:[38] subparagraph (b) does not refer to those reservations that are established (or made) simply by virtue of being formulated, but rather to those that are not permitted by the treaty. As in the situation in subparagraph (a), such reservations cannot be formulated: in one case (subparagraph (a)), the prohibition is explicit; in the other (subparagraph (b)), it is implied.

16. The principle of freedom to formulate reservations undoubtedly constitutes a key element of the Vienna regime and the question arises as to whether it should be the subject of a separate draft guideline, which could read as follows:

> "*3.1 [Freedom to formulate a reservation] [Presumption of validity of reservations]*
>
> *A State or an international organization may, at the time of signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, formulate a reservation.*"

17. However, not without some hesitation, the Special Rapporteur does not propose that the Commission should proceed in this manner. Such a guideline would no doubt have the merit of highlighting this key principle of the Vienna regime while not departing from the language of the 1969 and 1986 Conventions, since the wording used above is precisely that of the *chapeau* of article 19. Nevertheless, as a general rule, the Commission has avoided splitting up provisions from individual articles of the Vienna Conventions and reproducing them in separate draft guidelines.[39] More fundamentally, the principle of freedom to formulate reservations (and, by extension, the presumption of their validity) cannot be separated from the exceptions to this principle.

18. In conformity with the Commission's practice to date, and in the absence of any strong reason for doing otherwise, it seems preferable to include the entire text of article 19 at the beginning of the third part of the Guide to Practice, devoted to

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[37] See also J. M. Ruda, op. cit., note 17, p. 179 and 180, and the far more restrained criticism by Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, T.M.C. Asser Instituut, Swedish Institute of International Law, Studies in International Law, vol. 5, The Hague, p. 111 and 112.

[38] One may, however, question the use of the verbs "formulate" and "make" in article 23, paragraph 2; it is not consistent to state, at the end of this provision, that, if a reservation formulated when signing [a treaty] is confirmed at the time of the expression of consent to be bound, "the reservation shall be considered as having been *made* on the date of its confirmation". In elaborating the Guide to Practice on reservations, the Commission has endeavoured to adopt consistent vocabulary in this regard (the criticisms directed at it by R. Riquelme Cortado — op. cit., note 27, p. 85 — appear to be based on a translation error in the Spanish text).

[39] Cf. draft guidelines 1.1 (Definition of reservations), 2.2.1 (Formal confirmation of reservations formulated when signing a treaty) or 2.5.1 (Withdrawal of reservations), which reproduce the text of articles 2, para. 1 (d), 23, para. 2, and 22, para. 1, respectively, of the 1986 Vienna Convention. Nevertheless, the Commission has not followed this general rule when the structure of the Guide to Practice has necessitated the division of the various elements of individual provisions of the Convention among several guidelines (for example, the rules set forth in article 23 concerning the procedure regarding reservations, acceptance of and objection to a reservation are divided among several draft guidelines), but there is no reason for doing so in this instance. Note: the Commission prefers to base itself on the 1986 text, which is more complete than the 1969 one.

validity of reservations, and to give further information and clarifications, such as to provide useful guidance for the practice of States, in the commentary and in additional draft guidelines.

19. The only question that arises in this regard concerns the repetition in the *chapeau* of article 19 of the two Vienna Conventions of the different moments (or "instances" to reproduce the terminology used in draft guideline 1.1.2[40]) "[at] which a reservation may be formulated". Indeed, as is emphasized above,[41] article 19 reproduces the temporal limitations included in the very definition of reservations given in article 2, paragraph 1 (d), of the Vienna Conventions.[42] There is no doubt that this repetition is superfluous, as was stressed by Denmark during the consideration of the draft articles on the law of treaties adopted in 1962.[43] However, the Commission did not think it necessary to correct this anomaly when the final draft was adopted in 1966, and this repetition is not a sufficiently serious drawback to merit rewriting the Vienna Convention, which, moreover, has managed very well this drawback notwithstanding.

20. This being the case, it seems reasonable to reproduce in a draft guideline 3.1, which could be entitled "Freedom to formulate reservations", the text of article 19 of the 1986 Vienna Convention.

> "*3.1 Freedom to formulate reservations*
>
> *A State or an international organization may, at the time of signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, formulate a reservation unless:*
>
> *(a) The reservation is prohibited by the treaty;*
>
> *(b) The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or*
>
> *(c) In cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.*"

21. As the wording of subparagraph (c) of this provision implies, the three conditions for the validity of reservations stipulated in article 19 are not all of the same order. Subparagraphs (a) and (b) envisage the[44] situations in which a reservation is prohibited by the treaty, either expressly or impliedly, whereas subparagraph (c) concerns the cases in which a reservation is precluded despite the silence of the treaty. It will be helpful to consider the two situations separately.

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[40] *Yearbook* ... 1998, vol. II, part two, p. 99.

[41] Para. 12.

[42] See draft guidelines 1.1 (Definition of reservations) and 1.1.2 (Cases in which a reservation may be formulated) and the commentaries thereto, *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), p. 196 to 199 and 203 to 206.

[43] See the fourth report of Sir Humphrey Waldock (A/CN.4/177), cited above in note 20, p. 46.

[44] Or, more precisely, "*some* situations" because they are not all covered (see below, paras. 31-32).

B. Reservations prohibited by the treaty

22. According to Paul Reuter, the situations envisaged in subparagraphs (a) and (b) of article 19 constitute very simple cases.[45] Nothing could be less certain. It is true that these provisions refer to cases where the treaty to which a State or an international organization wishes to make a reservation contains a special clause prohibiting or permitting the formulation of reservations. But, aside from the fact that not all possibilities are explicitly covered, delicate problems can arise regarding the exact scope of a clause prohibiting reservations (1) and the effects of a reservation formulated despite that prohibition (2).

1. The scope of clauses prohibiting reservations

23. In draft article 17, paragraph 1 (a), which he submitted to the Commission in 1962, Waldock distinguished three possibilities:

- Reservations expressly "prohibited by the terms of the treaty or excluded by the nature of the treaty or by the established usage of an international organization";
- Those not falling under a clause restricting the making of reservations or
- [A clause] authorizing certain reservations.[46]

What these three cases had in common was that, unlike reservations incompatible with the object and purpose of the treaty,[47] "when a reservation is formulated that is not prohibited by the treaty, the other States are called upon to indicate whether they accept or reject it but, when the reservation is one prohibited by the treaty, they have no need to do so, for they have already expressed their objection to it in the treaty itself".[48]

24. Even though it was taken up again, in a slightly different form, by the Commission,[49] this wording was unnecessarily complicated and, at the rather general level at which the authors of the Convention intended to operate, there was no point in drawing a distinction between the first two possibilities identified by the Special Rapporteur.[50] In draft article 18, paragraph 2, which he proposed in 1965 in

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[45] Paul Reuter, "Solidarité et divisibilité des engagements conventionnels" in *International Law at a Time of Perplexity — Essays in Honour of Shabtai Rosenne*, Nijhoff, Dordrecht, 1999, p. 625 (also reproduced in P. Reuter, *Le développement de l'ordre juridique international — Écrits de droit international*, Economica, Paris, 1999, p. 363).

[46] First report, A/CN.4/144, cited above in note 23, p. 60.

[47] Situation envisaged in paragraph 2 of draft article 17 but in a rather different form than in the current text (see A/CN.4/558/Add.1).

[48] Sir Humphrey Waldock, First report, A/CN.4/144, cited above in note 23, p. 74, para. 9 of the commentary.

[49] Draft article 18, para. 1 (b), (c) and (d), *Yearbook ... 1962*, vol. II, p. 176 (see the commentary on this paragraph, p. 180, para. 15).

[50] On the contrary, during the discussion of the draft, Briggs considered that "the distinction was between the case set out in subparagraph (a), where all reservations were prohibited, and the case set out in subparagraphs (b) and (c), where only some reservations were either expressly prohibited or impliedly excluded". (*Yearbook ... 1962*, vol. I, 663rd meeting, 18 June 1962, p. 222, para. 12; against: Waldock, ibid., p. 247, para. 32; as the example of article 12 of the 1958 Convention on the Limits of the Continental Shelf (para. 41 below) indicates, this comment is highly relevant.

the light of the observations by Governments, he restricted himself to distinguishing reservations expressly prohibited by the treaty (or "by the established rules of an international organization")[51] from those implicitly prohibited as a result of the authorization of specified reservations by the treaty.[52] This dual distinction is found in a more refined form[53] in article 19, subparagraphs (a) and (b) of the Convention, without any distinction being made as to whether the treaty prohibits, or fully or partially authorizes reservations.[54]

(a) Express prohibition of reservations

25. According to Professor Tomuschat, the prohibition in subparagraph (a), as it is drafted, should be understood as covering both express prohibitions and implicit

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[51] Although the principle had not been disputed at the time of the discussion in plenary meeting in 1965 (but had been disputed by Lachs in 1962 (see *Yearbook* ... 1962, vol. I, 651st meeting, 25 May 1962, p. 142, para. 53) and had been retained in the text adopted during the first part of the seventeenth session (see *Yearbook* ... 1965, vol. II, p. 174) this indication disappeared without explanation from draft article 16 as finally adopted by the Commission in 1966 following the "final cleanup" by the Drafting Committee (see *Yearbook* ... 1966, vol. I, 887th meeting, 11 July 1966, para. 91). The deletion of this phrase should be seen in the context of the general safeguards clause concerning "constitutions of international organizations and treaties adopted within an international organization" appearing in article 5 of the Convention and adopted the same day in its final form by the Commission (ibid., para. 79). In practice, it is very unusual to allow reservations to be formulated to the constitution of an international organization (see Maurice H. Mendelson, "Reservations to the Constitutions of International Organizations", BYBIL 1971, p. 131 to 171). As for treaties concluded within the context of international organizations, the best example of (purported) exclusion of reservations is that of the International Labour Organization, whose consistent practice is not to accept the deposit of instruments of ratification of international labour conventions when accompanied with reservations (see the Memorandum submitted by the Director of the International Labour Office to the Council of the League of Nations on the admissibility of reservations to general conventions, *Official Journal* of the League of Nations, 1927, p. 882, or the memorandum submitted by the International Labour Organization to the International Court of Justice in 1951 in the case concerning the *Reservations to the Convention on Genocide, in ICJ Memoires, Pleadings and Documents*, 1951, p. 227 and 228, or the statement of Wilfred Jenks, Legal Adviser of the International Labour Organization, during the oral pleadings on that case, ibid., p. 234); for a discussion and critique of this position, see the commentary on draft guideline 1.1.8 (Reservations made under exclusionary clauses) of the Guide to Practice, in the *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10* (A/55/10), pp. 230-241, paras. 3 to 5.

[52] Fourth report, A/CN.4/177, cited above in note 20.

[53] On the editorial changes made by the Commission, see the debate on draft article 18 (*Yearbook* ... 1965, vol. I, especially the 797th and 798th meetings, 7 and 9 June 1965, p. 163-173) and the text adopted by the Drafting Committee (ibid., 813th meeting, 29 June 1965, p. 287, para. 1) and its discussion (ibid., p. 287-289). The final text of article 16 (a) and (b) adopted on second reading by the Commission read as follows: "A State may (...) formulate a reservation unless: (a) The reservation is prohibited by the treaty; (b) The treaty authorizes specified reservations which do not include the reservation in question" (*Yearbook* ... 1966, vol. II, p. 202) see also note 83 below.

[54] The "alternative drafts" proposed *de lege ferenda* in 1953 in the first report submitted by Hersch Lauterpacht all referred to treaties that "[do] not prohibit or restrict the faculty of making reservations" (first report, A/CN.4/63, cited above in note 22, p. 115-116, *Yearbook* ... 1953, p. 91-92).

prohibitions of reservations.[55] Some justification for this interpretation can be found in the *travaux préparatoires* for this provision:

- In the original wording, proposed by Waldock in 1962,[56] it was specified that the provision concerned reservations that were "expressly prohibited", a clarification that was abandoned in 1965 without explanation by the Special Rapporteur and with little light being shed by the discussions in the Commission on this matter;[57]

- In the commentary on draft article 16 adopted on second reading in 1965, the Commission in effect seems to place on the same footing "reservations expressly or implicitly prohibited by the provisions of the treaty".[58]

26. This interpretation, however, is open to discussion. The idea that certain treaties could "by their nature", exclude reservations was discarded by the Commission in 1962, when it rejected the proposal along those lines made by Waldock.[59] It is therefore hard to see what prohibitions could derive "implicitly" from a treaty, except in the cases covered by subparagraphs (a) and (b)[60] of article 19[61] and it must be recognized that subparagraph (a) concerns only reservations expressly prohibited by the treaty. Moreover, this interpretation is the only one compatible with the great liberalism that pervades all the provisions of the Convention that deal with reservations.

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[55] Christian Tomuschat, "Admissibility and Legal Effects of Reservations to Multilateral Treaties. Comments on Article 16 and 17 of the International Law Commission's Draft Articles on the Law of Treaties", Z.a.ö.R.V., 1967, p. 469.

[56] See para. 23 above.

[57] See, however, the statement by Yasseen, *Yearbook* ... 1965, vol. I, 797th meeting, 8 June 1965, p. 149, para. 19 "the words 'the terms of' (*expressément*) could be deleted and it could read simply: '[unless] the making of reservations is prohibited by the treaty ...' For it was enough that the treaty was not silent on the subject; it did not matter whether it referred to reservations implicitly or expressly" — but he was referring to the 1962 text.

[58] Like, moreover, "those expressly or impliedly authorized", *Yearbook* ... 1966, vol. II, p. 205, para. 10 of the commentary; see also p. 207, para. 17. In the same spirit, article 19, para. 1 (a) of the draft articles on the law of treaties concluded between States and international organizations or between two or more international organizations adopted by the Commission in 1981 placed on equal footing cases where reservations are prohibited by treaties and those where it is "otherwise established that the negotiating States and negotiating organizations were agreed that the reservation is prohibited" *Yearbook* ... 1981, vol. II, Part Two, p. 137.

[59] See para. 24 above. The Special Rapporteur indicated that in drafting this clause, "what he had had in mind was the Charter of the United Nations which, by its nature, was not open to reservations" (*Yearbook* ... 1962, vol. I, 651st meeting, 25 May 1962, p. 143, para. 60). This exception is covered by the safeguard clause of article 5 of the Convention (see note 60 below). The words "nature of the treaty" drew little attention during the discussion (Castrén, however, found the expression imprecise — ibid., 652nd meeting, 28 May 1962, p. 166, para. 28; see also Verdross, ibid., para. 35); it was deleted by the Drafting Committee (ibid., 663rd meeting, 18 June 1962, p. 221, para. 3).

[60] The amendments of Spain (A/CONF.39/C.1/L.147) and of the United States of America and Colombia (A/CONF.39/C.1/L.126 and Add.1) aimed at reintroducing the idea of the "nature" of the treaty in subparagraph (c) were withdrawn by their authors or rejected by the Drafting Committee (see the reaction of the United States, *Official Records of the United Nations Conference on the Law of Treaties, Second Session, Vienna, 9 April to 22 May 1969*, Summary records of plenary meetings and meetings of the plenary Committee (A/CONF.39/11/Add.1, p. 37).

[61] This is also the final conclusion arrived at by C. Tomuschat (op. cit., note 55, p. 471).

27. There is no problem — other than determining whether or not the declaration in question constitutes a reservation[62] — if the prohibition is clear and precise, in particular when it is a general prohibition, on the understanding, however, that there are relatively few such examples[63] even if some are famous, such as that in article 1 of the Covenant of the League of Nations:

> "The original Members of the League shall be those of the Signatories (...) as shall accede without reservation to this Covenant ..."[64]

Likewise, article 120 of the 1998 Rome Statute of the International Criminal Court states:

> "No reservations may be made to this Statute".[65]

And similarly, article 26, paragraph 1, the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal states:

> "No reservation or exception may be made to this Convention".[66]

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[62] See draft guideline 1.3.1 (Method of implementation of the distinction between reservations and interpretive declarations) and its commentary, *Yearbook ... 1999*, vol. II, second part, p. 107 to 109.

[63] Even in the area of human rights (see P. H. Imbert, "Reservations and Human Rights Conventions", Human Rights Review, 1981, p. 28 or W. A. Schabas, "Reservations to Human Rights Treaties: Time for Innovation and Reform", Canadian Yearbook of International Law, p. 46; see, however, for example, the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery of 7 September 1956 (article 9), the Convention against Discrimination in Education of 14 December 1960 (article 9, para. 7), Protocol No. 6 to the European Convention on Human Rights on the abolition of the death penalty of 28 April 1983 (article 4) or the European Convention against Torture of 26 November 1987 (article 21) which all prohibit any reservations to their provisions. Reservation clauses in human rights treaties sometimes refer to the provisions of the Vienna Convention concerning reservations (cf. article 75 of the American Convention on Human Rights) — which conventions containing no reservation clauses do implicitly — or reproduce its provisions (cf. article 28, para. 2 of the 1979 Convention on the Elimination of All Forms of Discrimination against Women or article 51, para. 2, of the 1989 Convention on the Rights of the Child).

[64] It could be maintained that this rule was set aside when the Council of the League recognized the neutrality of Switzerland (in this respect, M. Mendelson, op. cit., note 51, p. 140 and 141).

[65] However straightforward it may seem, this prohibition is not actually totally devoid of ambiguity: the highly regrettable article 124 of the Statute which authorizes "a State on becoming a party [to] declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court" with respect to war crimes, constitutes an exception to the rule stated in article 120, for such declarations amount to reservations (see A. Pellet, "Entry into Force and Amendment of the Statute" in Antonio Cassese, Paola Gaeta and John R. W. Jones, eds., *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, vol. I, p. 157; see also the European Convention on the Service Abroad of Documents relating to Administrative Matters, whose article 21 prohibits reservations, while several other provisions authorize certain reservations. For other examples, see Sia Spiliopoulou Åkermark, "Reservations Clauses in Treaties Concluded within the Council of Europe", *I C L Q*. 1999, p. 493 and 494; P. Daillier and A. Pellet, *Droit international public (Nguyen Quoc Dinh)*, L.G.D.J. Paris, 7th edition, 2002, p. 181; P. H. Imbert, op. cit., note 22, p 165 and 166; F. Horn, op. cit., note 37, p.113; R. Riquelme Cortado, op. cit., note 27, p. 105 to 108; W. A. Schabas, op. cit., note 63, p. 46.

[66] For a very detailed commentary, see Alessandro Fodella, "The Declarations of States Parties to the Basel Convention" in Tullio Treves ed., "Six Studies on Reservations", *Communicazioni e Studi*, vol. XXII, 2002, p. 111 to 148; article 26, paragraph 2, authorizes States parties to make "declarations or statements, however phrased or named, with a view, inter alia, to the

28. Sometimes, however, the prohibition is more ambiguous. Thus, in accordance with paragraph 14 of the Final Act of the 1961 Geneva Conference which adopted the European Convention on International Commercial Arbitration, "the delegations taking part in the negotiation of the Convention (...) declare that their respective countries do not intend to make any reservations to the Convention":[67] not only is it not a categorical prohibition, but this declaration of intention is even made in an instrument separate from the treaty. In a case of this type, it could seem that reservations are not strictly speaking prohibited, but that if a State formulates a reservation, the other Parties must, logically, object to it.

29. More often, the prohibition is partial and relates to one or more specified reservations or one or more categories of reservations. The simplest (but rather rare) situation is that of clauses listing the provisions of the treaty to which reservations are not permitted.[68] This is the case in article 42 of the Convention relating to the Status of Refugees of 28 July 1951[69] or article 26 of the 1972 International Convention for Safe Containers of the International Maritime Organization.

30. The situation where the treaty does not prohibit reservations to specified provisions but excludes certain categories of reservations is more complicated. An example of this type of clause is provided by article 78, paragraph 3, of the International Sugar Agreement of 1977:

> "Any Government entitled to become a Party to this Agreement may, on signature, ratification, acceptance, approval or accession, make reservations which do not affect the economic functioning of this Agreement [...]".

31. The distinction between reservation clauses of this type and those excluding specific reservations, was made in Sir Humphrey Waldock's draft in 1962.[70] For their part, the Vienna Conventions do not make such distinctions and, despite the uncertainty that prevailed in their *travaux préparatoires*, it should certainly be assumed that article 19, subparagraph (a) covers all three situations that a more precise analysis can discern:

– Reservation clauses prohibiting all reservations;

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harmonization of its laws and regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effects of the provisions of the Convention in their application to that State". The distinction between the reservations of paragraph 1 and the declarations of paragraph 2 can prove sensitive, but this is a problem of definition that does not in any way restrict the prohibition stated in paragraph 1: if a declaration made under paragraph 2 proves to be a reservation, it is prohibited. The combination of articles 309 and 310 of the 1982 Convention on the Law of the Sea poses the same problems and calls for the same responses (see, in particular, A. Pellet, "Les réserves aux conventions sur le droit de la mer" in *La mer et son droit — Melanges offerts a Laurent Lucchini et Jean-Pierre Quéneudec*, Pedone, Paris, 2003, p. 505 to 517; see also note 87 below).

[67] Example given by P. H. Imbert, op. cit., note 22, p. 166 and 167.

[68] This situation is extremely close to the one in which the treaty specifies the provisions to which reservations are permitted — see para. 39 below and the comments by Briggs (cited above in note 50).

[69] With regard to this provision, P. H. Imbert noted that the influence of the opinion (of the International Court of Justice on the reservations to the Convention on the Prevention and Punishment of the Crime of Genocide adopted two months earlier) is very clear since such a clause effectively protects the provisions which cannot be the object of reservations (op. cit., note 22, p. 167); see the other examples given, ibid., or paras. 39 to 41 below.

[70] See note 46 above.

– Reservation clauses prohibiting reservations to specified provisions;

– Finally, reservation clauses prohibiting certain categories of reservations.

32. While these distinctions could seem self-evident, it is undoubtedly useful to specify them expressly in draft guideline 3.1.1, which could read as follows:

3.1.1. *Reservations expressly prohibited by the treaty*

A reservation is prohibited by the treaty if it contains a particular provision:

– *Prohibiting all reservations;*

– *Prohibiting reservations to specified provisions;*

– *Prohibiting certain categories of reservations.*

33. This clarification seems all the more useful in that the third of these situations poses problems (of interpretation)[71] of the same nature as those arising from the criterion of compatibility with the object and purpose of the treaty,[72] which certain clauses actually reproduce expressly.[73] By indicating that these reservations, prohibited without reference to a specific provision of the treaty, still come under article 19, subparagraph (a) of the Vienna Conventions, the Commission could from the outset usefully emphasize the unity of the legal regime applicable to the reservations mentioned in the three subparagraphs of article 19.

(b) Implicit prohibition of reservations

34. A cursory reading of article 19 (b) of the Vienna Conventions could suggest that it represents one side of the coin and subparagraph (a) represents the other. However, the symmetry is far from total. To create such symmetry, it would have been necessary to stipulate that reservations other than those expressly provided for in the treaty were prohibited. But that is not the case: subparagraph (b) contains two additional details which prevent oversimplification; the implicit prohibition of certain reservations arising from this provision, which is considerably more complex than it seems, relies on the fulfilment of three conditions:

1. The treaty's reservation clause must permit the formulation of reservations;

2. The reservations permitted must be "specified";

3. It must be specified that "only" those reservations "may be made".[74]

35. The origin of article 19 (b) of the Vienna Conventions can be traced back to paragraph 3 of draft article 37 submitted to the Commission in 1956 by Fitzmaurice:

> "In those cases where the treaty itself permits certain specific reservations, or a class of reservations, to be made, there is a presumption that any other reservations are excluded and cannot be accepted".[75]

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[71] "Whether a reservation is permissible under exceptions (a) or (b) will depend on interpretation of the treaty" (A. Aust, op. cit., note 27, p. 110).

[72] See A/CN.4/558/Add.1, para. 91.

[73] See the examples given above in note 63. That is a particular example of "prohibited categories of reservations" — in a particularly vague way, it is true.

[74] See para. 15 above.

[75] First report, *Yearbook* ... 1956, p. 115; see also para. 95.

Waldock took up that concept again in paragraph (1) (a) of draft article 17, which he proposed in 1962 and which the Commission used in paragraph 1 (c) of draft article 18. That draft article was adopted the same year[76] and, following a number of minor drafting changes, was incorporated into article 16 (b) of the 1966 draft[77] and then into article 19 of the Convention.

36. That course of action did not go unchallenged, however, as during the Vienna Conference a number of amendments were submitted with a view to deleting that provision[78] on the pretext that it was "too rigid"[79] or redundant because it duplicated subparagraph (a),[80] or that it had not been confirmed by practice;[81] all those amendments were, however, withdrawn or rejected.[82]

37. The only change to subparagraph (b) was made by means of a Polish amendment inserting the word "only" after the word "authorizes", which was accepted by the Drafting Committee of the Vienna Conference "in the interest of greater clarity".[83] This innocuous appearance must not obscure the vast practical implications of this amendment, which actually reverses the presumption made by the Commission and, in keeping with the Eastern countries' persistent desire to facilitate as much as possible the formulation of reservations, offers the possibility of doing so even when the negotiators have taken the precaution of expressly

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[76] See paras 23 and 24 above.

[77] See note 53 above.

[78] Amendments by the United States of America and Colombia (A/CONF.39/C.1/L.126 and Add.1) and the Federal Republic of Germany (A/CONF.39/C.1/L.128), which were specifically designed to delete subparagraph (b), and by the Union of Soviet Socialist Republics (see note 28 above), France (A/CONF.39/C.1/L.169), Ceylon (A/CONF.39/C.1/L.139) and Spain (A/CONF.39/C.1/L.147), which proposed major revisions of article 16 (or of articles 16 and 17) that would also have led to the disappearance of that provision (for the text of these amendments, see *Documents of the Conference* (A/CONF.39/11/Add.2), cited above in note 28, p. 144 and 145, paras. 174 to 177). During the Commission's discussion of the draft, certain members had also taken the view that that provision was unnecessary (*Yearbook ... 1965*, vol. I, 797th meeting, 8 June 1965, Yasseen, p. 149, para. 18; Tunkin, *ibid.*, para. 29; but, for a more nuanced position, see *ibid.*, para. 33; or Ruda, para. 70).

[79] According to the representatives of the United States of America and Poland at the Commission's 21st plenary meeting (10 April 1968, *Summary records* (A/CONF.39/11), cited above in note 31, p. 117, para. 8 and p. 128, para. 42); see also the statement made by the representative of the Federal Republic of Germany (*ibid.*, p. 119, para. 23).

[80] Colombia, *ibid.*, p. 123, para. 68.

[81] Sweden, *ibid.*, p. 127, para. 29.

[82] See *Documents of the Conference* (A/CONF.39/11/Add.2), cited above in note 28, p. 148 and 149, paras. 181 to 188. See the explanations of the Special Rapporteur, Sir Humphrey Waldock, *Summary records* (A/CONF.39/11), cited above in note 31, 24th meeting, 16 April 1968, p. 137, para. 6, and the results of the votes on those amendments, *ibid.*, 25th meeting, 16 April 1968, p. 146, paras. 23-25.

[83] A/CONF.39/C.1/L.136; see *Summary records* (A/CONF.39/11), cited above in note 31, Plenary Commission, 70th meeting, 14 May 1968, p. 453, para. 16. Already in 1965, during the Commission's discussion of draft article 18 (b) as reviewed by the Drafting Committee, Castrén proposed inserting "only" after "authorizes" in paragraph (b) (*Yearbook ... 1965*, vol. I, 797th meeting, 8 June 1965, p. 149, para. 14 and 813th meeting, 29 June 1965, p. 264, para. 13; see also the similar proposal made by Yasseen, *ibid.*, para. 11), which, in the end, was not accepted following a further review by the Drafting Committee (see *ibid.*, 816th meeting, p. 308, para. 41).

indicating the provisions in respect of which a reservation is permitted.[84] However, this amendment does not exempt a reservation which is neither expressly permitted nor implicitly prohibited from the requirement to observe the criterion of compatibility with the object and purpose of the treaty.[85]

38. In practice, permissible reservation clauses are similar in nature to those containing prohibitive provisions and they pose the same kind of difficulties with regard to determining *a contrario* those reservations which may not be formulated:[86]

- Some of them authorize reservations to particular provisions, expressly and restrictively listed either affirmatively or negatively;
- Others authorize specified categories of reservations;
- Lastly, others (few in number) authorize reservations in general.

39. Article 12, paragraph 1, of the 1958 Geneva Convention on the Continental Shelf appears to illustrate the first of those categories:

> "1. At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1 to 3 inclusive".[87]

As Sir Ian Sinclair has noted, "Article 12 of the 1958 Convention did not provide for specified reservations, even though it may have specified articles to which reservations might be made"[88] and neither the scope nor the effects of that authorization are self-evident, as demonstrated by the judgment of the International

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[84] See F. Horn, op. cit., note 37, p. 114, Liesbeth Lijnzaad, *Reservations to UN Human Rights Treaties: Ratify and Ruin?*, T. M. C. Asser Institut, Nijhoff, Dordrecht, 1994, p. 39, Jean-Marie Ruda, "Reservations to Treaties", *Recueil du cours de l'Académie de Droit international de la Haye* 1975-III, vol. 146, p. 181 or Renata Szafarz, "Reservations to Multilateral Treaties", *Polish Yearbook of International Law*, 1970, p. 299 and 300. Such restrictive formulas are not unusual — see, for example, article 17 (1) of the Convention on the reduction of statelessness of 1954 ("1. At the time of signature, ratification or accession any State may make a reservation in respect of articles 11, 14 or 15. 2. No other reservations to this Convention shall be admissible") and the other examples given by R. Riquelme Cortado, op. cit., note 27, p. 128 and 129. On the significance of the reversal of the presumption, see also M. Robinson, *Yearbook of the International Law Commission*, 1995, vol. I, 2402nd meeting, *Yearbook of the International Law Commission*, 1995, vol. I, p. 169, para. 17.

[85] See A/CN.4/558/Add.1, paras. 59-70.

[86] See (a) above.

[87] Article 309 of the United Nations Convention on the Law of the Sea provides: "No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention" (on this provision, see A. Pellet, op. cit., note 66, p. 505 to 511). A treaty may set a maximum number of reservations or provisions that can be subject to reservations (see, for example, article 25 of the 1967 European Convention on the Adoption of Children). These provisions may be compared with those authorizing Parties to accept certain obligations or to choose between the provisions of a treaty, which are not reservation clauses *stricto sensu* (see draft guidelines 1.4.6 and 1.4.7 of the Commission and the related commentary in the *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10* (A/55/10), cited above in note 51, p. 241 to 252).

[88] Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties*, Manchester University Press, 2nd edition, 1984, p. 73. On the distinction between specified and non-specified reservations, see also para. 47 below.

Court of Justice in the *North Sea Continental Shelf* cases[89] and, above all, by the arbitral ruling given in 1977 in the *Mer d'Iroise* case.[90]

40. In that case, the Arbitral Tribunal emphasized that:

> The clear terms of article 12 [of the 1958 Geneva Convention on the Continental Shelf] authorize any Contracting State, in particular the French Republic, to make its consent to be bound by the Convention conditional upon reservations to articles other than articles 1 to 3 inclusive.[91]
>
> However,
>
> Article 12 cannot be understood to compel States to accept in advance any kind of reservation to articles other than articles 1 to 3. Such an interpretation of article 12 would almost give contracting States the freedom to draft their own treaty, which would clearly go beyond the object of this article. Only if the article in question had authorized the formulation of specific reservations could it be understood that parties to the Convention had accepted in advance a specified reservation. But that is not the case here, because article 12 authorizes the formulation of reservations to articles other than articles 1 to 3 in very general terms.[92]

41. The situation is different when the reservation clause defines the categories of permissible reservations. Article 39 of the General Act of Arbitration of 1928 provides an example of this:

> "1. In addition to the power given in the preceding article[93], a Party, in acceding to the present General Act, may make his acceptance conditional upon the reservations exhaustively enumerated in the following paragraph. These reservations must be indicated at the time of accession.
>
> 2. These reservations may be such as to exclude from the procedure described in the present Act:
>
> (a) Disputes arising out of facts prior to the accession either of the Party making the reservation or of any other Party with whom the said party may have a dispute;
>
> (b) Disputes concerning questions which by international law are solely within the domestic jurisdiction of States;
>
> (c) Disputes concerning particular cases or clearly specified subject-matters, such as territorial status, or disputes falling within clearly defined categories".

As the International Court of Justice pointed out in its judgment of 1978 in the *Aegean Sea Continental Shelf* case:

> "When a multilateral treaty thus provides in advance for the making only of particular, designated categories of reservations, there is clearly a high

[89] See judgment of 20 February 1969, *I.C.J. Reports 1969*, p. 38 to 41.

[90] Ruling of 30 June 1977, *Reports of International Arbitral Awards*, vol. XVIII, p. 161 to 165, paras. 39-44.

[91] Ibid., p. 161, para. 39.

[92] Ibid.

[93] Article 38 provides that Parties may accede to only parts of the General Act.

> probability, if not an actual presumption, that reservations made in terms used in the treaty are intended to relate to the corresponding categories in the treaty",

when even States do not "meticulously" follow the "pattern" set out in the reservation clause.[94]

42. Another particularly famous and widely discussed example[95] of a clause authorizing reservations (and which, for its part, falls under the second category mentioned above[96]) is found in article 57 (ex 64) of the European Convention on Human Rights:

> "1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this article.
>
> 2. Any reservation made under this article shall contain a brief statement of the law concerned."

In this instance, the authority to formulate reservations is limited by conditions relating to both form and content; in addition to the usual limitations *ratione temporis*,[97] a reservation to the Convention must:

– Refer to a particular provision of the Convention;

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[94] Judgment of 19 December 1978, *I.C.J. Reports 1978*, p. 28, para. 55.

[95] See Angela Bonifazi, "La disciplina delle riserve alla Convenzione europea dei diritti dell'uomo", in *Les clauses facultatives de la Convention européenne des droits de l'homme* (Minutes of the round table organized in Bari on 17 and 18 December 1973 by the Faculty of Law of the University of Bari), Levante, Bari, 1974, p. 301 to 319; Gérard Cohen-Jonathan, *La Convention européenne des Droits de l'homme*, Economica, Paris, 1989, p. 86 to 93; J. A. Frowein, "Reservations to the European Convention on Human Rights" in *Protecting Human Rights: the European Dimension. Studies in Honour of Gerard J. Wiarda*, C. Heymanns Verlag, Köln, 1988, p. 193 to 200; Pierre-Henri Imbert, "Reservations to the European Convention on Human Rights Before the Strasbourg Commission: The *Temeltasch* Case", *I.C.L.Q.*, 1984, p. 558 to 595; Rolf Kühner, "Vorbehalte und auslegende Erklärungen zur Europäischen Menschenrechtskonvention. Die Problematik des Art. 64 MRK am Beispiel der schweizerischen 'auslegenden Erklärung' zu Art. 6 Abs. 3 lit. e MRK", *ZaöRV*, vol. 42, 1982, p. 58 to 92 (summary in English); S. Marcus-Helmons, "L'article 64 de la Convention de Rome ou les réserves à la Convention européenne des droits de l'homme", *Revue de droit international et de droit comparé*, 1968, p. 7 to 26; Maria Jose Morais Pires, *As reservas a Convenção europeia dos direitos do homen*, Livraria Almedina, Coimbra, Portugal, 1997, 493 pages; Rosario Sapienza, "Sull'ammissibilità di riserve all'accettazione della competenza della Commissione europea dei diritti dell'uomo", *Rivista di Diritto internazionale*, 1987, p. 641 to 653 and William A. Schabas, "Article 64" in E. Decaux, P.-H. Imbert and L. Pettiti dirs., *La Convention européenne des droits de l'homme: commentaire article par article*, Economica, Paris, 1995, p. 923 to 942.

[96] Paragraph 38. For other examples, see A. Aust, op. cit., note 27, p. 109 and 110; S. Spiliopoulou Åkermark, op. cit., note 65, p. 495 and 496; William Bishop, Jr., "Reservations to Treaties", *R.C.A.D.I.* 1996-II, vol. 103, p. 323 and 324 or P. Daillier and A. Pellet, op. cit., note 393, p. 181; see also the table of Council of Europe conventions showing clauses falling into each of the first two categories of permissible reservation clauses mentioned in para. 38 above, in C. R. Riquelme Cortado, op. cit., note 27, p. 125, and the other examples of partial authorizations given by this author, p. 126 to 129.

[97] See note 25, above.

– Be justified by the status of legislation [in the reserving State] at the time that the reservation is formulated;

– Not be "couched in terms that are too vague or broad for it to be possible to determine their exact meaning and scope";[98] and

– Be accompanied by a brief statement explaining "the scope of the Convention provision whose application a State intends to prevent by means of a reservation".[99]

Assessing whether each of these conditions has been met raises problems. However, it can still be considered that the reservations authorized by the Convention are "specified" within the meaning of article 19 (b) of the Vienna Conventions and that only such reservations are valid.

43. It has been noted that this wording is not fundamentally different[100] from that used, for example, in article 26, paragraph 1, of the European Convention on Extradition of 1957:

> "Any Contracting Party may, when signing this Convention or when depositing its instrument of ratification or accession, make a reservation in respect of any provision or provisions of the Convention",

even though the latter could be interpreted as a general authorization. However, while the type of reservations that can be formulated to the European Convention on Human Rights is "specified", here the authorization is restricted only by the exclusion of across-the-board reservations.[101]

44. In fact, a general authorization of reservations[102] itself does not necessarily resolve all the problems. In particular, it leaves unanswered the question of whether the other Parties may still object to reservations[103] and whether these expressly authorized reservations[104] are subject to the test of compatibility with the object and

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[98] European Court of Human Rights, judgement of 29 April 1988, *Belilos, Series A*, vol. 132, p. 25, para. 55.

[99] Report of the European Commission of Human Rights of 5 May 1982, *Temeltasch*, Application No. 9116/80, *European Commission of Human Rights Yearbook*, vol. 25, para. 90.

[100] P.-H. Imbert, op. cit., note 22, p. 186; see also R. Riquelme Cortado, op. cit., note 27, p. 122.

[101] Regarding this concept, see draft guideline 1.1.1 of the Commission's Guide to Practice and the commentary in *Yearbook ... 1999*, vol. II, Part Two, p. 93 to 95.

[102] For another even clearer example, see article 18, paragraph 1, of the European Convention on the Compensation of Victims of Violent Crimes (1983): "Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, declare that it avails itself of one or more reservations."

[103] This is sometimes expressly stated (see, for example, article VII of the Convention on the Political Rights of Women (1952) and the related comments by R. Riquelme Cortado, op. cit., note 27, p. 121). Article 20, paragraph 1, of the Vienna Convention does not resolve the problem: it allows the reservation to be "established" (or "made") without requiring acceptance, but says nothing about objections. It can, however, be argued that paragraph 4 of the same article seems to exclude the possibility of objecting to a "reservation expressly authorized by a treaty" owing to the fact that paragraph 4 apparently does not apply to cases not falling under paragraph 1.

[104] It cannot be reasonably argued that paragraph (b) could include "implicitly authorized" reservations — other than on the grounds that any reservations that are not prohibited are, a contrario, authorized, subject to the provisions of paragraph (c). In this case, the expression "specified reservation" in article 19, subparagraph (b) is similar to the expression "reservation expressly authorized by a treaty" found in article 20, paragraph 1.

purpose of the treaty.[105] This last point will be discussed under *sub lit.* (c) (see A/CN.4/558/Add.1).

45. At this stage, the only question that arises is whether it is necessary for a particular guideline of the Guide to Practice to specify the scope of article 19, subparagraph (b) of the Vienna Conventions. This could be done in two different ways. One way would be to consider a draft guideline which, where authorized reservations are concerned, would be the equivalent of draft guideline 3.1.1, the text of which is proposed above.[106] However, subparagraph (b) expressly states that the authorization of only "specified reservations" by the treaty (to the exclusion of any other possibility) prohibits the formulation of other reservations. The only option therefore would be to say, *a contrario*, that, if the treaty authorizes the formulation of reservations in a general manner or does not "specify" the reservations that can be formulated in a restricted manner, reservations may still be formulated. Such a draft would merely say the same thing as the existing draft of this paragraph[107] but in a different, "negative" way and would not therefore be particularly useful.

46. On the other hand, it is probably not superfluous to include in the Guide to Practice a draft guideline defining what is meant by "specified reservations". Indeed, such a definition has important consequences for the applicable legal regime, as it can legitimately be argued that reservations which are not "specified" must pass the test of compatibility with the object and purpose of the treaty.

47. Such a definition is not straightforward. It caused particular controversy following the arbitration in the *Mer d'Iroise* case.[108] For some reserving States, a reservation is "specified" if the treaty sets precise limits within which it can be formulated; these criteria then replace (but only in this instance) the criterion of the object and purpose of the means.[109] This position can be based on the arbitral award of 1977, even though that award says more about what a specified reservation is not than what it is.[110] Indeed, the upshot of all this is that the mere fact that a reservation clause authorizes reservations to particular provisions of the treaty is not enough to "specify" these reservations within the meaning of article 19, subparagraph (b).[111] However, the Court confines itself to requiring reservations to be "specific",[112] without indicating what the test of this specificity is to be.

48. It has been noted,[113] however, and not without justification, that it is unrealistic to require the content of authorized reservations to be established with

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[105] See the questions raised by S. Spiliopoulou Åkermark, op. cit., note 65, p. 496 and 497 or R. Riquelme Cortado, op. cit., note 27, p. 124.

[106] Paragraph 32.

[107] Such a guideline should probably be worded as follows: "Paragraph (b) of guideline 3.1 does not exclude the formulation of reservations not expressly provided for by the treaty if the treaty authorizes reservations in a general manner or provides for the freedom to formulate reservations without specifying which reservations can be formulated in a restricted manner."

[108] See note 90, above.

[109] Derek W. Bowett, "Reservations to Non-Restricted Multilateral Treaties", *British Yearbook of International Law*, 1976-1977, p. 71 and 72.

[110] See para. 40, above.

[111] See paras. 39 and 40, above.

[112] In reality, it is the authorization that must apply to specific or specified reservations — terms which the Court considers to be synonymous (see note 90, above).

[113] See in particular: P.-H. Imbert, "La question des réserves dans la décision arbitrale du 30 juin 1977 relative à la délimitation du plateau continental entre la République française et le

precision by the treaty and that this occurs very exceptionally, other than in the rare cases, of "negotiated reservations".[114] In addition, during the Vienna Conference, K. Yasseen, Chairman of the Drafting Committee, included specified reservations among reservations which are expressly authorized by the treaty,[115] with no further clarification. On the other hand, however, the Commission did not retain Mr. Rosenne's proposal that the expression "specified reservations", which he considered "unduly narrow", should be replaced by "reservations to specific provisions".[116]

49. None of these considerations are decisive. However, a compromise must be found between the undoubtedly excessive (because it largely deprives article 19, subparagraph (b) of the Vienna Conventions of any real effect) theory which requires the content of authorized reservations to be precisely stated in the reservation clause and the theory which equates a specified reservation with a reservation expressly authorized by the treaty,[117] even though articles 19, paragraph (b), and 20, paragraph 1, use different expressions. To this end, it must of course be recognized that reservations that are specified within the meaning of guideline 3.1 (b) must, on the one hand, relate to specific provisions and, on the other, fulfil certain conditions specified in the treaty, but without going so far as to require their content to be predetermined. Such a definition could read as follows:

3.1.2 *Definition of specified reservations*

For the purposes of guideline 3.1, the expression "specified reservations" means reservations that are expressly authorized by the treaty to specific provisions and which meet conditions specified by the treaty.

2. The effect of formulation of a reservation prohibited by a treaty (rejection)

50. It has always been understood that a reservation could not be formulated (let alone "made") where this was expressly or implicitly prohibited by a clause of the treaty. This self-evident truth was stated as long ago as 1950 by Brierly in his first report on the law of treaties; paragraphs (1), (2) and (4) of his proposed draft article 10 on reservations to treaties began with the following formula: "*Unless the contrary is indicated in a treaty* ...".[118] As he explained in the commentary on this provision:

Royaume-Uni de Grande-Bretagne et d'Irlande du Nord", *Annuaire Français de Droit International*, 1978, p. 50 to 53.

[114] Regarding this concept, see the Commission's fifth report on reservations to treaties, A/CN.4/508/Add.1, paras. 164-171. The main example given by D. Bowett to illustrate his theory relates precisely to a "negotiated reservation" (op. cit., note 109, p. 71).

[115] A/CONF.39/C.1/SR.70, para. 23.

[116] *Yearbook* ... 1965, vol. I, 813th meeting, 29 June 1965, p. 264, para. 7. However, P.-H. Imbert (op. cit., note 113, p. 52) points out, not without reason, that even though Mr. Rosenne's proposal was not accepted, Sir Humphrey Waldock himself had also drawn this parallel (ibid., p. 265, para. 27).

[117] In this connection, see P.-H. Imbert, ibid., p. 53.

[118] The French version A/CN.4/23, cited above in note 22, includes the variants: "*A moins que le contraire n'y soit stipulé* ..." ["Unless the contrary is indicted in ..."] (p. 49), "*A moins que le contraire ne soit stipulé dans le traité* ..." ["Unless the contrary is indicated in the treaty ..."] (p. 51), "*A moins que le contraire ne soit stipulé dans le texte d'un traité*" ["Unless the contrary is indicated in the text of a treaty"] (p. 54), p. 238, 239 and 241.

"[...] in relation to particular treaties, it may have been made clear in advance that the intending parties will not accept any reservation whatsoever. Clauses to this effect in texts of treaties are not uncommon."[119]

51. This logical premise has never been questioned.[120] It simply serves as a reminder that the provisions of the Convention are residuary in nature:[121] "where the treaty itself deals with the question of reservations, the matter is concluded by the terms of the treaty".[122] Where such a clause prohibits the reservation envisaged, the reservation cannot be formulated; conversely, however, where such a clause authorizes the reservation, the question of its validity does not arise.[123] The apparent simplicity of these common sense rules[124] nevertheless obscures delicate problems. Once the problem of the scope of a conventional prohibition on formulating reservations has been resolved, the question arises as to the possible effect of a reservation formulated in spite of the clause expressly (article 19, subparagraph (a)) or implicitly (subparagraph (b)) prohibiting it.

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[119] Ibid., p. 50, para. 88 (English text in *Yearbook ... 1950*, vol. II, p. 239); see also p. 239 and 240, para. 90.

[120] See the first and second reports of Lauterpacht of 1953 (A/CN.4/63, cited above in note 22, p. 136, para. (4)) and 1954 (A/CN.4/87, cited above in note 22, p. 131, para. (1)); the first report of Waldock (A/CN.4/144, cited above in note 23, p. 68, art. 17, para. 1 (a) (i) and p. 74, para. (9)), the explanations he gave during Commission discussions (*Yearbook ... 1962*, vol. I, 653rd meeting, 29 May 1962, p. 157, para. (57)) and the text adopted by the Commission in first reading (ibid., vol. II, p. 176, art. 18, para. 1 (a)) and the related commentary (p. 178 and 179, paras. (10) and (15)); the fourth report of Waldock (A/CN.4/177, cited above in note 20, p. 53, art. 18, para. 2 (a)) and the text adopted by the Commission in 1965 (*Yearbook ... 1965*, vol. II, p. 162, art. 18 (a)) and the related commentary (ibid., vol. II, p. 207, art. 16 (a), para. (17)). Paragraph (a) of draft article 16 caused very few problems during the Vienna Conference; only the amendments proposed by Ceylon (A/CONF.39/C.1/L.147, *Documents of the Conference* (A/CONF.39/11/Add.2) cited above in note 28, p. 134), which were subsequently withdrawn (*Summary records* (A/CONF.39/11), cited above in note 31, 24th meeting, 16 April 1968, p. 127, para. 26), and by the Union of Soviet Socialist Republics, which completely changed draft articles 16 and 17, would have resulted in its deletion (A/CONF.39/C.1/L.115, cited above in note 28); according to the representative of the Soviet Union, this paragraph (like subparagraph (b)) "seemed to be unnecessary, since cases where reservations were prohibited by the treaty were extremely rare. Moreover, retention of the subparagraph would have the effect of laying down a rule which formed an exception, thus restricting the power of States to make reservations." (*Summary records* (A/CONF.39/11), cited above in note 31, Committee of the Whole, 21st meeting, 10 April 1968, p. 107, para. (5)). This amendment was rejected by the Committee of the Whole by 70 votes to 10 with 3 abstentions (ibid., 25th meeting, 16 April 1968, p. 135, para. (23)).

[121] See para. 12 and note 27, above.

[122] *Yearbook ... 1962*, vol. II, p. 178-179, commentary on draft articles 18 to 20, para. (10). Paragraphs (a) and (b) of article 19 "are little more than an acknowledgement that the parties are free to make provision in their treaty whether or to what extent to allow reservations to its terms" (D. W. Greig, op. cit., note 29, p. 51).

[123] See the arbitral award of 30 June 1977 in the *Mer d'Iroise* case, cited above, note 90, p. 161, para. 39: "under article 12 [of the Geneva Convention on the Continental Shelf, cited above, para. 39], the United Kingdom has undertaken not to contest the right, on the part of the French Republic, to be a party to the Convention with the reservations permitted by this article" — however, this does not resolve the earlier question of whether the reservations formulated by France were valid in the first place (see above, para. 39).

[124] To the extent that it has been said that "there is clearly no need for an additional rule in the Vienna Convention" (L. Lijnzaad, op. cit., note 84, p. 39); see also note 45, above.

52. No provision of the Vienna Convention expressly answers this question, of great practical importance, and the *travaux préparatoires* relating to article 19[125] do not shed any light in this regard.[126] This response may have seemed obvious where subparagraphs (a) and (b) are concerned.[127] However, if it is obvious, there is no reason not to transpose it to the situation, generally considered much more uncertain, of subparagraph (c): nothing in the text of the Convention or on the basis of logic justifies different responses.[128] And yet the question of the effects of a reservation that is incompatible with the object and purpose of the treaty (situation of subparagraph (c)) was the subject of long and largely inconclusive discussions during the *travaux préparatoires* on the 1969 Convention. It would therefore seem preferable not to separate the consideration of the effects of a reservation formulated in spite of an express or implicit prohibition within the meaning of article 19, subparagraph (c), from that of the consequences of a reservation that is contrary to the object and purpose of the treaty.

53. Suffice to say at this stage that many commentators believe that a reservation formulated in spite of a conventional prohibition is null and void[129] and consider that its formulation invalidates the expression of consent to be bound.[130] If this is the case, these conclusions should affect the response to the question concerning the effects of a reservation formulated in spite of the provisions of article 19 (c).

[125] See note 53, above.

[126] See D. W. Greig, op. cit., note 29, p. 52 and 53 or A. Fodella, op. cit., note 66, p. 140. See also C. Tomuschat, who believes, however, that the preparatory work demonstrates that in the Commission's view it was impossible to accept a reservation excluded under paragraphs (a) and (b) (op. cit., note 55, p. 477).

[127] For a critical analysis of this pseudo-evidence, see D. W. Greig, op. cit., note 29, p. 52 and 53 and 154.

[128] In this connection, see A. Aust, op. cit., note 27, p. 118 or D. W. Bowett, who believes that this conclusion must be reached a fortiori in the case envisaged in subparagraph (c), op. cit., note 109, p. 83.

[129] See, for example, D. Bowett, op. cit., note 109, p. 84. For a more nuanced analysis, see D. W. Greig, op. cit., note 29, p. 56 and 57.

[130] D. Bowett, op. cit., note 88, p. 84 or Giorgio Gaja, "Unruly Treaty Reservations", *Le droit international à l'heure de sa codification. Etudes en l'honneur de Roberto Ago*, Giuffré, Milan, 1987, vol. I, p. 314. See also C. Tomuschat, op. cit., note 55, p. 467; see the references to Commission's discussions, ibid., note 12; these discussions are less conclusive in this respect than the author would have us believe.